

<b>BARBARA S. MILLS,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. 2:11CV12 HEA</b>
	)	
<b>CAROLYN W. COLVIN,<sup>1</sup></b>	)	
<b>Acting Commissioner of Social Security,</b>	)	
	)	
<b>Defendant.</b>	)	

This matter is before the Court on Plaintiff's request for judicial review under 28 U.S.C. § 405(g) of the final decision of Defendant denying Plaintiff's applications for Disability Insurance Benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. §§ 401, *et seq.* and Supplemental Security Income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381, *et seq.* For the reasons set forth below, the Court will affirm the Commissioner's denial of Plaintiff's application.

Plaintiff was 43 years old at the time of the hearing. She has a high school

<sup>1</sup> Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin should be substituted for Michael J. Astrue as the Defendant in this suit. No further action needs to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

education. The ALJ found Plaintiff had the severe impairments of: degenerative disc disease, major depressive disorder and polysubstance dependence. At the January 13, 2010 hearing, Plaintiff testified that she lives with her boyfriend and her granddaughter visits most weekends. Plaintiff testified that she works part time at Ameriserve, two to three hours a day. Plaintiff testified that she has pain in her back and legs; she has panic attacks five to six times a year and is depressed because of her medical condition. Plaintiff takes hot baths after work and several times per day when she is not working.

Plaintiff's application for social security and supplemental security income benefits under Titles II, 42 U.S.C. §§ 401, *et seq.* and XVI , 1381, *et seq.* was denied on . Plaintiff appeared and testified before ALJ Victor L. Horton on January 13, 2010. On June 17, 2010, the ALJ issued an unfavorable decision. On December 20, 2010, the Appeals Council denied Plaintiff's request for review of the ALJ's decision. Thus, the decision of the ALJ stands as the final decision of the Commissioner.

### **Standard For Determining Disability**

The Social Security Act defines as disabled a person who is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve

months.” 42 U.S.C. § 1382c(a)(3)(A); see also *Hurd v. Astrue*, 621 F.3d 734, 738 (8th Cir.2010). The impairment must be “of such severity that [the claimant] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.” 42 U.S.C. § 1382c(a)(3)(B).

A five-step regulatory framework is used to determine whether an individual claimant qualifies for disability benefits. 20 C.F.R. §§ 404.1520(a), 416.920(a); see also *McCoy v. Astrue*, 648 F.3d 605, 611 (8th Cir.2011) (discussing the five-step process). At Step One, the ALJ determines whether the claimant is currently engaging in “substantial gainful activity”; if so, then he is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I); *McCoy*, 648 F.3d at 611. At Step Two, the ALJ determines whether the claimant has a severe impairment, which is “any impairment or combination of impairments which significantly limits [the claimant's] physical or mental ability to do basic work activities”; if the claimant does not have a severe impairment, he is not disabled. 20 C.F.R. §§ 404.1520(a) (4)(ii), 404.1520(c), 416.920(a)(4)(ii), 416.920(c); *McCoy*, 648 F.3d at 611. At Step Three, the ALJ evaluates whether the claimant's

impairment meets or equals one of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (the “listings”). 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the claimant has such an impairment, the Commissioner will find the claimant disabled; if not, the ALJ proceeds with the rest of the five-step process. 20 C.F.R. §§ 404.1520(d), 416.920(d); *McCoy*, 648 F.3d at 611.

Prior to Step Four, the ALJ must assess the claimant's “residual functional capacity” (“RFC”), which is “the most a claimant can do despite [his] limitations.” *Moore v. Astrue*, 572 F.3d 520, 523 (8th Cir.2009) (citing 20 C.F.R. § 404.1545 (a) (1)); see also 20 C.F.R. §§ 404.1520(e), 416.920(e). At Step Four, the ALJ determines whether the claimant can return to his past relevant work, by comparing the claimant's RFC with the physical and mental demands of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1520(f), 416.920(a)(4)(iv), 416.920(f); *McCoy*, 648 F.3d at 611. If the claimant can perform his past relevant work, he is not disabled; if the claimant cannot, the analysis proceeds to the next step. *Id.* At Step Five, the ALJ considers the claimant's RFC, age, education, and work experience to determine whether the claimant can make an adjustment to other work in the national economy; if the claimant cannot make an adjustment to other work, the claimant will be found disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *McCoy*, 648 F.3d at

611.

Through Step Four, the burden remains with the claimant to prove that he is disabled. *Moore*, 572 F.3d at 523. At Step Five, the burden shifts to the Commissioner to establish that the claimant maintains the RFC to perform a significant number of jobs within the national economy. *Id.*; *Brock v. Astrue*, 674 F.3d 1062, 1064 (8th Cir.2012).

### **ALJ's Decision**

Applying the foregoing five-step analysis, the ALJ in this case determined at Step One that Plaintiff had not engaged in substantial gainful activity since November 1, 2006, the alleged onset date. At Step Two, the ALJ found that Plaintiff had the following severe impairments: degenerative disc disease, major depressive disorder and polysubstance dependence. At Step Three, the ALJ found that Plaintiff does not have an impairment or combination of impairments that meets or medically equals one of the impairments in the listings.

Prior to Step Four, the ALJ found that Plaintiff had the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b), except that Plaintiff can stand and/or walk for at least two hours in an eight hour day. She can occasionally climb ramps and stairs, stoop, kneel, crouch, and crawl, and she can frequently balance. Plaintiff cannot climb ladders or ropes

or scaffolds and has to avoid concentrate exposure to extreme cold, vibrations and hazards. Plaintiff has moderate limitations in her ability to maintain concentration for extended periods, maintain schedules, complete workdays, perform at a consistent pace and respond to workplace changes. At Step Four, the ALJ determined that Plaintiff was unable to perform any past relevant work. At Step Five, the ALJ determined that Plaintiff has acquired work skills from her previous relevant work that are transferable to other occupations with jobs existing in significant numbers in the national economy. Because Plaintiff was determined to be capable of performing past relevant work, the ALJ determined Plaintiff had not been under a disability as defined in the Act.

### **Standard For Judicial Review**

The Court's role in reviewing the Commissioner's decision is to determine whether the decision "“complies with the relevant legal requirements and is supported by substantial evidence in the record as a whole.”” *Pate–Fires v. Astrue*, 564 F.3d 935, 942 (8th Cir.2009) (quoting *Ford v. Astrue*, 518 F.3d 979, 981 (8th Cir.2008)). “Substantial evidence is ‘less than preponderance, but enough that a reasonable mind might accept it as adequate to support a conclusion.’” *Renstrom v. Astrue*, 680 F.3d 1057, 1063 (8th Cir.2012) (quoting *Moore v. Astrue*, 572 F.3d 520, 522 (8th Cir.2009)). In determining whether substantial evidence supports

the Commissioner's decision, the Court considers both evidence that supports that decision and evidence that detracts from that decision. *Id.* However, the court "do[es] not reweigh the evidence presented to the ALJ, and [it] defer[s] to the ALJ's determinations regarding the credibility of testimony, as long as those determinations are supported by good reasons and substantial evidence." *Id.* (quoting *Gonzales v. Barnhart*, 465 F.3d 890, 894 (8th Cir.2006)). "If, after reviewing the record, the court finds it is possible to draw two inconsistent positions from the evidence and one of those positions represents the AL's findings, the court must affirm the AL's decision." *Partee v. Astrue*, 638 F.3d 860, 863 (8th Cir.2011) (quoting *Goff v. Barnhart*, 421 F.3d 785, 789 (8th Cir.2005)). The Court should disturb the administrative decision only if it falls outside the available "zone of choice" of conclusions that a reasonable fact finder could have reached. *Hacker v. Barnhart*, 459 F.3d 934, 936 (8th Cir.2006).

### **Discussion**

In her appeal of the Commissioner's decision, Plaintiff makes the following arguments: (1) the ALJ failed to make a proper credibility finding regarding Plaintiff's testimony in accordance with Social Security Ruling 96-7P and *Polaski*; (2) the Vocational Expert's Testimony was not based upon substantial evidence.

Initially, Plaintiff argues that the ALJ's determination was conclusory and

failed to recite any factors which are used for evaluating symptoms. As Defendant properly notes, Plaintiff was helped through treatment and medication. She was able to continue working, at least part time, and the medical records show “mild” disc disease, and no evidence of nerve root compression and “small tears” associated with bulging discs as well as “mild” stenosis. These findings are noted by the ALJ in her decision.

“The claimant bears the burden of demonstrating that his impairment matches all the specified criteria of a listing. *See Steed v. Astrue*, 524 F.3d 872, 874 n. 3 (8th Cir.2008) (‘Through step four of [disability] analysis, the claimant has the burden of showing that she is disabled.’). *McDade v. Astrue*, 2013 WL 3868115, 5 (8th Cir. July 29, 2013).

The ALJ considered Plaintiff’s work record and her daily activities in considering her credibility.

When analyzing a claimant's subjective complaints of pain, the ALJ must consider the five factors from *Polaski v. Heckler*: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness and side effects of medication; and (5) functional restrictions. See 739 F.2d 1320, 1322 (8th Cir.1984); see also 20 C.F.R. §§ 404.1529, 416.929. “The ALJ [is] not required to discuss



methodically each *Polaski* consideration, so long as he acknowledge[s] and examine[s] those considerations before discounting [the claimant's] subjective complaints.” *Lowe v. Apfel*, 226 F.3d 969, 972 (8th Cir.2000). “Because the ALJ [is] in a better position to evaluate credibility, we defer to his credibility determinations as long as they [are] supported by good reasons and substantial evidence.” *Cox v. Barnhart*, 471 F.3d 902, 907 (8th Cir.2006).

The ALJ provided good reasons supported by substantial evidence. The ALJ noted Plaintiff was not unduly restricted in her daily activities, which included the ability to perform some work part time. Because the ALJ properly applied *Polaski* and provided valid reasons for her conclusions on Plaintiff’s credibility. *McDade*, 2013 WL 3868115, 1-4.

Plaintiff also claims the ALJ erred in determining that she can perform other work which determination was assisted by the vocational expert’s testimony. Plaintiff argues that the vocational expert’s testimony seemed to be contradictory. However, as Defendant correctly argues, the testimony of which Plaintiff complains did not include the residual functional capacity ultimately reached by the ALJ, and therefore the responses are not relevant. *Travis v. As true*, 477 F.3d. 1037, 1043 (8th Cir. 2007).

### **Conclusion**

After careful examination of the record as a whole, the Court finds the Commissioner's determination is supported by substantial evidence on the record as a whole, and therefore, the decision will be affirmed.

Accordingly,

**IT IS HEREBY ORDERED** that the decision of the Commissioner of Social Security is **affirmed**.

A separate judgment in accordance with this Opinion, Memorandum and Order is entered this same date.

Dated this 4th day of September, 2013.

A handwritten signature in cursive script, reading "Henry Edward Autrey", written over a horizontal line.

**HENRY EDWARD AUTREY**  
**UNITED STATES DISTRICT JUDGE**